United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

affidavit

75-4217

To be argued by
MARY P. MAGUIRE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4217

FABIO HECTOR TOBON-GOMEZ,
Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

PETITION TO REVIEW AN ORDER OF
THE BOARD OF IMMIGRATION APPEALS

RESPONDENT'S BRIEF

THOMAS J. CAHILL,
United States Attorney for the Southern District of New York, Attorney for Respondent.

THOMAS H. BELOTE,
MARY P. MAGUIRE,
Special Assistant United States Attorneys, Of Counsel.

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CASES CITED

ISSUE PRESENTED

WHETHER THE DECISION FINDING TOBON DEPORTABLE UNDER SECTION 241(a)(2) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. §1251(a)(2) IS SUPPORTED BY CLEAR, CONVINCING AND UNEQUIVOCAL EVIDENCE

STATEMENT OF THE CASE

Pursuant to Section 106 of the Immigration and Nationality Act (the "Act"), 8 U.S.C. §1105a, Fabio Hector Tobon-Gomez petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals (the "Board") on April 9, 1975. That order dismissed an appeal from the decision and order of an Immigration Judge finding him deportable under Section 241(a)(2) of the Act, 8 U.S.C. §1251(a)(2). The petitioner contends that the Board's order should be reversed because it was discriminatory and violated the petitioner's rights under the Fifth Amendment of the United States Constitution.

STATEMENT OF FACTS

The petitioner is a 27 year old alien, a native and citizen of Colombia who was admitted on March

14, 1971 as a nonimmigrant visitor for business authorized to remain in this country until September 13, 1971. He failed to depart at the expiration of his authorized visitation and has been illegally residing and employed in the United States.

On December 31, 1974, after his apprehension by the Service, deportation proceedings were commenced with the issuance of an order to show cause and notice of hearing. The deportation hearing was conducted on February 2, 1975 wherein the alien was represented by privately retained counsel. Further, an interpreter was provided at government expense to insure complete comprehension of the proceedings by the alien. During the deportation hearing the alien admitted the factual allegations contained in the order to show cause and applied for the discretionary privilege of voluntary departure under Section 244(e) of the Act, 8 U.S.C. §1254(e). Although he conceded the factual allegations in the order to show cause, Tobon declined to concede his deportability on the ground that the

Immigration and Nationality Act discriminated between aliens of the Eastern and Western hemispheres. At the conclusion of the hearing the Immigration Judge rendered a decision finding Tobon deportable as charged, and granting him the discretionary privilege of voluntary departure. In his decision the Immigration Judge noted that the statutory provisions relating to a finding of deportability accord equal treatment to all aliens who have overstayed their authorized visitation regardless of whether they come from the Eastern or Western Hemisphere. On February 12, 1975 Tobon appealed that decision to the Board of Immigration Appeals. On appeal the alien noted that he was married to a permanent resident alien of the United States. He again alleged that the provisions of the Act unconstitutionally discriminated against Western Hemisphere aliens. On April 9, 1975 the Board affirmed the decision of the Immigration Judge and dismissed the appeal. The Board granted Tobon an additional thirty days to effect his voluntary departure. Tobon again refused to depart from the United States and on May 10, 1975 the Service issued a warrant for his deportation.

On October 3, 1975, shortly before the expiration of the six month period during which an action can be co enced under Section 106(a)(1) of the Act, Tobon filed this petition to review the Board's order. Since that date Tobon has enjoyed the automatic statutory stay of his deportation which accompanies a petition filed pursuant to Section 106 of the Act. In this action Tobon raises a new issue which is quite irrelevant to the issue of his deportability under Section 241(a)(2) of the Act. In his brief Tobon claims that the procedure in which aliens are assigned priority dates, i.e. the date on which an alien becomes eligibile to be considered by an American Consulate for the issuance of an immigrant visa, deprives him of equal protection under the United States Constitution. It is respectfully submitted that this action is frivolous and has merely been instituted for the purpose of delaying Tobon's departure until such time as he reaches his priority date and becomes eligible to obtain an immigrant visa at an American Consulate.

RELEVANT REGULATIONS

22 C.F.R. §42.61:

Consular records of visa applications.

(a) Waiting lists. Consular officers at Foreign Service posts designated to issue immigrant visas shall maintain records of individual immigrant visa applicants who are entitled to immigrant classification and their priority dates, which shall constitute "waiting lists" within the meaning of section 203 of the Act and which shall indicate the chronological and preferential order in which consideration may be given to immigrant visa applications within the several immigrant classifications subject to the numerical limitations specified in sections 201, 202, and 203 of the Act and section 21(e) of the Act of October 3, 1965, or within the classes described in section 201(b) or 101(a)(27) (B) through (E) which are not subject to numerical limitations . . . .

Priority date of individual applicants.

(a) The priority date of a preference visa applicant shall be the filing date of the approved petition which accorded him that preference.

(b) The priority date of other applicants shall be -

(1) The date that an individual labor certification under section 212(a)(14) of the Act has been granted for the applicant, or

(2) The date of submission to the consular officer or to the Immigration and Naturalization Service in appropriate cases of evidence to establish that: . . . .

(ii) The applicant has a relationship to a U.S. citizen or resident alien which statutorily exempts him from the provisions of section 212(a)(14). . . . .

ARGUMENT

TOBON WAS PROPERLY FOUND TO BE DEPORTABLE UNDER SECTION 241(a)(2) OF THE ACT BY REASON OF HIS HAVING OVERSTAYED HIS AUTHORIZED VISITATION

At his deportation hearing on February 2, 1975 Tobon conceded all the factual allegations contained in the order to show cause and notice of hearing. It is respectfully submitted, therefore, that his deportability has been established by clear, convincing, and unequivocal evidence. Woodby v. Immigration and Naturalization Service, 385 U.S. 276 (1966).

As to the issue Tobon seeks to raise before this Court, it is respectfully submitted that he has been

assigned a priority date in accordance with the applicable regulations and nothing in this process has deprived Tobon of any right guaranteed by the Constitution.* See Noel v. Chapman, 508 F.2d 1023 (2d Cir. 1975), cert. denied U.S. (October 6, 1975). The petitioner's brief reflects that Tobon married a lawful permanent resident on July 10, 1973. Although his wife could have immediately applied for verification of her resident status, and thereby obtained a priority date for the petitioner, it appears that she waited until October 23, 1974 before submitting the proper documents to the Service district office in Hartford, Connecticut. It also appears from the petitioner's brief that upon the submission of her application her permanent resident status was verified and properly forwarded to the American Consulate on January 9, 1975. See 22 C.F.R.

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*We note that the petitioner never raised this issue in his deportation hearing or appeal. Further, although the respondent in this matter is the Immigration and Naturalization Service Tobon is contesting regulations promulgated by the Secretary of State. Finally, although Tobon's claims will be discussed it does not appear that his issue is properly raised in an action pursuant to Section 106 of the Act, 8 U.S.C. §1105a.

§§42.61, 42.62. Tobon now complains that he is too far from reaching his priority date. In the process of assigning priority dates, the petitioner has been treated similarly to other aliens seeking priority dates by virtue of their familial relationships to United States citizens or resident aliens.

Tobon's attempt to find unequal treatment with respect to the assignment of priority dates under 22 C.F.R. §42.62 is clearly without merit. In both cases described in the petitioner's brief, (i.e., aliens seeking a priority date on the basis of an approved labor certification, and those aliens, like the petitioner, who are exempted from that requirement under Section 212(a)(14) by virtue of a family relationship with a United States citizen or resident alien) the priority date assigned is based upon the submission of the requisite application. In the case of an alien who is married to a lawful permanent resident the priority date is that date when the resident alien spouse submits the proper application

to the Service in order to verify her resident alien status. In the case of an alien who must obtain labor certification under Section 212(a)(14) a priority date is assigned when the alien applies and receives approval of his application for labor certification from the Department of Labor. In Tobon's case the regulations provide that a priority date will be assigned when his wife's resident alien status is verified by the Attorney General. Similarly, in the case of an alien seeking entry into the United States who must obtain labor certification under Section 212(a)(14) of the Act, the regulations provide that a priority date will be assigned when his employment situation vis-a-vis the labor certification requirements is verified by the Secretary of Labor. No provision of the Act or the regulations adopted pursuant thereto require that the priority date in Tobon's situation relate back to the date of his marriage. Similarly, in the case of an alien with an approved labor certification, nothing requires that the assignment of a priority date relate back to the date of the alien's job offer or employment which forms the basis

of his approved labor certification. It is respectfully submitted that Tobon has conjured a feigned rather than real distinction in treatment relating to the assignment of priority dates.

The Courts have consistently recognized Congress' plenary power over matters relating to the admission of aliens into the United States. See Kleindienst v. Mandel, 408 U.S. 753 (1972). Pursuant to this power Congress has fashioned a comprehensive system regulating immigration into the United States and has delegated to the Attorney General and the Secretary of State the power to establish regulations pursuant to that system. Sections 103 and 104 of the Act, 8 U.S.C. §§1103, 1104. Assuming arguendo that Tobon could find a real distinction in the procedure relating to the assignment of priority dates he must demonstrate that those regulations are wholly devoid of any conceivable rational purpose or are fundamentally aimed at acheiving a goal unrelated to the regulation of immigration. See Noel v. Chapman, supra; see also Dunn v. Immigration and Naturalization Service, 499 F.2d. 856 (9th

Cir. 1974), cert. denied, 419 U.S.1106(1975); Faustino v. Immigration and Naturalization Service, 302 F.Supp. 212 (S.D.N.Y. 1969), aff'd per curiam, 432 F.2d 429 (2d Cir. 1970), cert. denied, 401 U.S. 921 (1971); Fiallo v. Levi, F. Supp. (U.S.D.C. E.D.N.Y.) (Slip. op. 74 C. 1083, November 28, 1975). This he is unable to do. The assignment of Tobon's priority date upon his spouse's application and the verification of her lawful permanent resident status is clearly and rationally related to the implementation of the statutory provisions relating to the admission of aliens such as the petitioner. See Section 101(a)(27)(A) of the Act, 8 U.S.C. §1101(a)(27)(A); Section 212(a)(14) of the Act, 8 U.S.C. §1182(a)(14); Noel v. Chapman, supra. Were Tobon's theory of priority dates adopted it would clearly frustrate effective enforcement of the immigration laws and lead to inequitable results.*

*Assume, under Tobon's theory, that A an illegal alien married B, a lawful resident alien in 1973. By refusing to submit an application for verification of her resident status, B would not alert the Service to the illegal status and whereabouts of her husband,A. She would thereby be able to reside with him despite the Service policy described in Noel v. Chapman, supra, until such time had elapsed since the date of their marriage as A would be entitled to immediately obtain an immigrant visa. On the other hand, assuming B wishes to abide by the country's immigration laws the submission of her application for verification of her resident status upon their marriage would alert the Service to the whereabouts of her spouse, lead to the institution of deportation proceedings, and may cause the temporary separation of A and B while the former awaits his priority date outside the United States.

CONCLUSION

The petition for review should be dismissed.

March 1, 1976

Respectfully submitted,

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Attorney for the Respondent.

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Of Counsel.

Form 280 A-Affidavit of Service by Mail
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AFFIDAVIT OF MAILING

CA 75-4217

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 2

1st day of March, 19 76 she served a copy of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Stephen B. Horton, Esq.,
Cardwell & Cardwell, Esqs.,
108 Oak St.
Hartford, Conn. 06106

And deponent further says he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this

1st day of March, 1976

Lawrence Mason

LAWRENCE MASON
Notary Public, State of New York
No. 03-2572560
Qualified in Bronx County
Commission Expires March 30, 1977